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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 394

THE TRUST COMPANY OF CHICAGO, Administrator of Estate of Elizabeth Palmer Smith, deceased, and JASON PAIGE, as Executor of Estate of Carrie E. Paige, deceased and others, Petitioners, vs. **CITY OF CHICAGO, and others,** Respondents.	Petition for writ of certiorari to Appellate Court of Illinois, First District. There heard on Appeal from Circuit Court of Cook County to Supreme Court of Illinois, to November Term, 1942 and transferred. Honorable John Prystalski, Chancellor. Mandamus and Class Suit in Equity to Administer a Trust.

REPLY TO ANSWER BY RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

WEIGHTSTILL WOODS,
77 West Washington Street,
Chicago 2, Illinois,
Attorney for Petitioners.

HORACE RUSSELL,
LAWRENCE C. MILLS,
WILLIAM D. WOLLESEN,
Of Counsel.

Scheffer Printing Company, Del. 7171

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Petitioners,

vs.

CITY OF CHICAGO, and others,

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Honorable
John Prystalski,
Chancellor.

Mandamus and Class Suit in Equity to Administer a Trust.

REPLY TO ANSWER BY RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

The statement by respondents in this Court, and before the State Courts, is one of confession. They admit the correctness and truth of our complaint and our petition. In this Court and in the State Courts, they have sought an avoidance by ignoring the nature and effect of the pleadings in the record and by contending the the Courts must decide in favor of respondents, without any regard for the language of the pleadings in equity and the petition here by the plaintiffs.

Respondents Wish to Denature This Equity Suit. They Advocate Judicial Repeal of the Constitution.

The plaintiffs raised constitutional issues by the complaint in the trial court (Tr. 33-40), and reasserted the same by the petition for rehearing in the Appellate Court (Tr. 77 ff), by all the briefs that were filed in each of the Illinois Courts, and by our petition now before this Court, (Page 4 ff and 25-32). The respondents and the Courts of Illinois deny to us due process of law and equal protection of law by their words of bold assertion which seek to denature our suit from being one in chancery into becoming a suit at law, basically different in its nature.

When the respondents by their answer in this Court contend that the action by Illinois Courts was merely erroneous, they ignore the record to which we have just now made reference, by which the plaintiffs throughout this record have asserted as their grievance the denial of constitutional rights in equity, and the confiscation of property without equal application of law and contrary to due process of law. At Page 4 ff and 25 to 32 of our petition in this Court, our constitutional grievances are restated.

The attempt by the answer to erase this continuous record of constitutional grievance by merely stating that it does not exist, constitutes failure on the part of the respondents to meet the issues which are presented by petitioners. Respondents do not overcome our record and our petition by stating to this Court that respondents are blind to that which they do not wish to see, and do not wish to acknowledge. Respondents seek to supplant our case by assuming one of their own choosing.

Defendants' answer asserts that the petitioners were given their day in Court. But petitioners have shown by this record they did *not* receive any day in Court, *on the case in chancery made by their pleadings.* Under Illinois Laws and its Constitution, petitioners were entitled to a hearing upon their property rights in equity before the Courts of Illinois, upon their pleadings in chancery. This right has been ignored and refused, by the action of those Courts, as we have shown by the record.

This Court has many times stopped the destruction of citizen rights, attempted by one or another form of either direct or indirect evasion. In the case at bar, we have shown an attempt to destroy our property rights by circumvention. Respondents persuaded the courts of Illinois to suppose and to decide a case at law, when the facts set forth by the complaint establish a case of historic chancery, which is entitled to claim and to receive from this court the protection of the fourteenth amendment to the Constitution of the United States.

The basic distinction and separate history of law or jus and chancery or equitas, is fundamental and elementary in the Roman Law and in the Common Law. Until recently these two streams of jural protection for the citizen were administered by entirely different and separate Courts. The jural separateness and jural permanence of these two streams of right and procedure to which every citizen may have access is embedded in the Constitution of Illinois, Article VI, Section 12. (Tr. 34 and 78.)

But the respondents and the Courts of Illinois in this case at Bar would erase entirely so far as petitioners are concerned, both the right and procedure of chancery or equity.

The answer by respondents adopts the theory of the *dissenting* Opinion in the case of *Bell* v. *Hood,* which is discussed at Page 8 and following of our petition. The respondents contend that the Courts of Illinois may disregard the pleadings that are before them, and may of their own will set up and decide a different sort of case that could be stated and was stated in other records by other litigants (Chapralis, Cohen, Blakeslee), using another assembly of facts and theories of law, that historically and fundamentally have consequences that are different from the trust and equity theory and the facts pertaining thereto, upon which this record was conceived and carried out.

The cases cited by respondents were at law on law pleadings. They are shown to be inapplicable by our petition. (Page 7: Tr. 77.) The respondents contend by their answer, that the Courts of Illinois may adopt and decide this case upon the assertions made by respondents, which are merely oral so far as this record is concerned. The answer by respondents makes no page reference at all to any part of the record. They rely upon oral theory not stated nor founded upon this record. The Cohen, Blakeslee and Chapralis cases, were not in chancery and do not present any trust theory nor do they seek any equitable remedy.

The motion by respondents as defendants in the trial court (Tr. 55), admitted entirely the truth of all facts stated by our complaint in equity (Tr. 15-53). Especially we mention that the motion admits Paragraph 49 (Tr. 47) reading as follows:

"*Statutes of Limitations do not apply.*

"(49) The active express duties of defendants, to levy, assemble and distribute to the plaintiffs said

trust funds, are so primary and so firmly established by said sections of the constitutions, that all power is withheld from the legislature, to make any statute of limitation applicable, to any facts or transactions mentioned in this complaint. In the alternative the plaintiffs say, that no facts or circumstances exist or have occurred, which are sufficient to start the running of any statute of limitation, which the defendants might claim to be applicable to this suit."

The answer by respondents in this court and their argument in all Illinois Courts, and all action by Illinois Courts, each and all ignore completely and proceed directly contrary to that admission by the respondents by this record.

The right of petitioners is not merely procedural; but is a substantive right of property under the Constitution. From *Potter* v. *Couch*, 141 U. S. 296 at 320, we quote as follows:

"This Statute, as has been adjudged by this court, establishes a rule of property, and not of procedure only; and applies to all cases where the creditor, or his representative, is obliged, by the nature of the interest sought to be reached, to resort to a court of equity for relief, as he must do in all cases where the legal title is in trustees, for the purpose of serving the requirements of an active trust, and where, consequently, the creditor has no lien, and can acquire none at law, but obtains one only by filing a bill in equity for that purpose. The words 'in trust,' as used in the exception or proviso, cannot have a more restricted meaning than the same words in the enacting clause." Citing cases: see our petition Page 4 ff., and Tr. 75 ff., 33 ff.

Harmon v. *City of Peoria*, 373 Ill. 594; 27 N. E. 2d 525 at 529:

"Furthermore, this court appears to be committed to the doctrine that mere acquiescence, irrespective of

the period of time, cannot legalize clear usurpation of power which offends against the basic law. *Forbes* v. *Hubbard,* 348 Ill. 166; 180 N. E. 767."

Our Courts in the case of *Maloney* v. *City of DesPlaines,* 303 Ill. App. 233, and *Markman* v. *Calumet City,* 297 Ill. App. 531, *Bankers Life Company* v. *Chicago Park District,* 318 Ill. App. 214, *Roberts* v. *Village of Lyons,* 307 Ill. App. 36, and many other cases, has ruled that statutes of limitation in these special assessment matters cannot be applied, until after the municipality has definitely shown that it has funds available and offers payment. The contrary fact of refusal to make payment (Tr. 6), is established by this record. The City of Chicago does not so proceed. It merely asserts there is some statute of limitation. Defendants fail to specify any statute. (Tr. Pages 8, 55.) The facts are not shown by the defense and do not exist, which are necessary to start the running of any Statute of Limitation. *White* v. *Sehrman,* 168 Ill. 589; 48 N. E. 128 at 132. Notice of disclaimer and repudiation of trust are indispensable to start running of time for limitation.

Epling v. *Dickson* (Page 14 of our petition) was a *chancery suit like the record at bar.* It was confirmed and approved by the opinon in *Mansure* v. *City of Chicago,* 372 Ill. 156. This record relied upon the *Epling* decision.

Likewise *Cordova* v. *Hood,* 84 U. S. 1 at 5:

"That the vendor by such a deed, had a lien for the unpaid purchase money, as against the vendee and those holding under him with notice, unless the lien was waived, is *the recognized doctrine of English chancery,* and Texas is one of the states in which the doctrine has been adopted. *Osborn* v. *Cummings,* 4 Tex. 13; *Neel* v. *Prickett,* 12 Tex. 138; *Briscoe* v. *Bronaugh,* 1 Tex. 326. It is a general principle that a vendor of land, though he has made an absolute

conveyance by deed, and though the consideration is in the instrument expressed to be paid, has an equitable lien for the unpaid purchase money, unless there has been an express or an implied waiver of it. And this lien will be enforced in equity against the vendee and all persons holding under him, except bona fide purchasers, without notice. *Mackreth* v. *Symmons*, 15 Ves. 329."

Pickrel v. *Doubet*, 239 Ill. App. 553 at 556 fully confirms the claim in this record for an enforcement in chancery of vendor's lien owned by the plaintiffs.

No record pleading would have value any more in any case, if this Court sustains the acts of jural substitutions done here by respondents and the Illinois Courts, and sustains the theory of the answer made here by the respondents.

The petition for certiorari should be allowed and proceedings should follow as prayed by our petition.

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Petitioners.

HORACE RUSSELL,
LAWRENCE C. MILLS,
WILLIAM D. WOLLESEN,
Of Counsel.